No. ____

In The
Supreme Court of the United States

Gene Gonzales and Susan Gonzales, Horwath Family Two, LLC, and The Washington Landlord Association,

Petitioners,

v.

Governor Jay Inslee and State of Washington,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Washington

PETITION FOR WRIT OF CERTIORARI

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Question Presented

In March 2020, the State of Washington prohibited almost all residential evictions. It stripped rental property owners of the right to possess and exclude, and, for the next 15 months, the State dictated the terms, conditions, and duration of tenants' occupancy. Petitioners are housing providers in Washington who were thus forced to relinquish possession of their rental units to unwelcome occupants. *Ala. Ass'n of Realtors v. Dep't of Health & Human Svcs.*, 141 S.Ct. 2485, 2489 (2021) ("preventing [property owners] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude"). The Supreme Court of the State of Washington held that this compelled occupation was not an unconstitutional physical taking because it merely regulated an existing landlord-tenant relationship and was not actionable in accord with *Yee v. City of Escondido*, 503 U.S. 519 (1992).

The question presented is:

Whether an ordinance that compels the possession of property by an unwelcome occupant is a categorical physical taking, as the Eighth Circuit held in *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022), or a permissible regulation of use under *Yee v. City of Escondido*?

Parties to the Proceedings and Rule 29.6 Statement

Petitioners were the plaintiffs-appellants in all proceedings below. Petitioners Gene Gonzales and Susan Gonzales are individuals. Petitioner Horwath Family Two, LLC is a limited liability corporation organized under the laws of the State of Washington. It has no parent corporation and issues no shares. Petitioner Washington Landlord Association is a nonprofit association organized under the laws of the State of Washington. It has no parent association and issues no shares.

Respondents Jay R. Inslee, in his official capacity as Governor of the State of Washington, and the State of Washington were the defendants-appellees in all proceedings below.

Related Proceedings

Gonzales v. Inslee, 2 Wash.3d 280 (Wash. Sept. 28, 2023, as amended Nov. 29, 2023)

Gonzales v. Inslee, 21 Wash.App.2d 110 (Wash. Court of Appeals Feb. 23, 2022)

Gonzales v. Inslee, No. 20-2-02525-34, 2021 WL 8085514 (Wash. Super. May 21, 2021)

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Petition for a Writ of Certiorari

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Washington.

Opinions Below

The decision of the Supreme Court of Washington can be found at *Gonzales v. Inslee*, 2 Wash.3d 280 (2023), and is reprinted at Pet.App. 1a–33a. The Court of Appeals decision can be found at *Gonzales v. Inslee*, 21 Wash.App.2d 110 (2022), and is reprinted at Pet.App. 34a–69a. The Washington Superior Court's decision can be found at *Gonzales v. Inslee*, No. 20-2-02525-34, 2021 WL 8085514 (Wash. Super. May 21, 2021), and is reprinted at Pet.App. 72a–74a.

Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

In the court below, Petitioners alleged state constitutional violations. Pet.App. 14a. However, with respect to regulatory takings, Washington follows federal law. *Chong Yim v. City of Seattle*, 194 Wash.2d 651, 658–59 (2019) ("[T]his court has always attempted to define regulatory takings consistent with federal courts applying the takings clause of the Fifth Amendment. The federal definition of regulatory takings has been substantially clarified since we last considered the issue, such that the legal underpinnings of our precedent have changed or disappeared altogether. It has not been shown that we should adopt a Washington-specific definition as a matter of independent state law at this time, and we

therefore adopt the definition of regulatory takings set forth by the United States Supreme Court in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005)[.]") (cleaned up).

In the decision below, the Supreme Court of Washington rested primarily upon federal grounds and the independence of any possible state constitutional grounds is not expressly stated, nor apparent from the four corners of the decision. Pet.App. 14a–16a. Consequently, this Court has jurisdiction to consider the federal issue. *Fla. v. Powell*, 559 U.S. 50, 56–57 (2010); *Ohio v. Robinette*, 519 U.S. 33, 36–37 (1996); *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983).

Constitutional Provision and Ordinance at Issue

The Fifth Amendment to the U.S. Constitution provides in relevant part, "nor shall private property be taken for public use, without just compensation."

The State of Washington's Proclamation 20-19.6, dated, March 18, 2021, continuing a Moratorium on Residential Evictions provides, in relevant part:[1]

> Landlords, property owners, and property managers are prohibited from serving or enforcing, or threatening to serve or enforce, any notice requiring a resident to vacate any dwelling or parcel of land occupied as a dwelling, including but not limited to an eviction notice, notice to pay or vacate, notice of

[1] The proclamation is reprinted in full at Pet.App. 74a–91a.

unlawful detainer, notice of termination of rental, or notice to comply or vacate. This prohibition applies to tenancies or other housing arrangements that have expired or that will expire during the effective period of this Proclamation. This prohibition does not apply to emergency shelters where length of stay is conditioned upon a resident's participation in, and compliance with, a supportive services program. Emergency shelters should make every effort to work with shelter clients to find alternate housing solutions. This prohibition applies unless the landlord, property owner, or property manager (a) attaches an affidavit to the eviction or termination of tenancy notice attesting that the action is necessary to respond to a significant and immediate risk to the health, safety, or property of others created by the resident; or (b) provides at least 60 days' written notice of the property owner's intent to (i) personally occupy the premises as the owner's primary residence, or (ii) sell the property[.]

Landlords, property owners, and property managers are prohibited from seeking or enforcing, or threatening to seek or enforce, judicial eviction orders involving any dwelling or parcel of land occupied as a dwelling, unless the landlord, property owner, or property manager (a) attaches an affidavit to the eviction or termination of tenancy notice attesting that the action is necessary to respond to a significant and immediate risk to the health,

> safety, or property of others created by the resident; or (b) shows that at least 60 days' written notice were provided of the property owner's intent to (i) personally occupy the premises as the owner's primary residence, or (ii) sell the property. Such a 60-day notice of intent to sell or personally occupy shall be in the form of an affidavit signed under penalty of perjury.
>
> Local law enforcement are prohibited from serving, threatening to serve, or otherwise acting on eviction orders affecting any dwelling or parcel of land occupied as a dwelling, unless the eviction order clearly states that it was issued based on a court's finding that (a) the individual(s) named in the eviction order is creating a significant and immediate risk to the health, safety, or property of others; or (b) at least 60 days' written notice were provided of the property owner's intent to (i) personally occupy the premises as the owner's primary residence, or (ii) sell the property. Local law enforcement may serve or otherwise act on eviction orders, including writs of restitution that contain the findings required by this paragraph.

Introduction and Summary of Reasons for Granting the Petition

The government is categorically required to pay just compensation for any compelled physical occupation of private property. U.S. Const. amend. V. This is because a property owner's fundamental right to possess and exclude has always been paramount;

forever bound to liberty and individual freedom. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 148–49 (2021); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432–35 (1982). It does not matter whether the occupation is permanent or temporary, large or small, continuous or intermittent, economically harmful or economically benign. *Cedar Point*, 594 U.S. at 153.

However, this constitutionally protected property right has been steadily eroded by a recurring misinterpretation of *Yee v. City of Escondido*, 503 U.S. 519 (1992). *Yee* pertained to a rent control regulation that limited the rent that could be charged for the land beneath mobile homes. *Id.* at 524. Although the owners were not seeking to evict their current tenants, they nevertheless claimed that rent control was a compelled physical invasion because it allowed continued occupancy at below market rents. *Id.* at 527. In this context, *Yee* held that no physical taking occurred because the owners voluntarily leased space to the occupants and legally retained the right to evict. *Id.* at 524, 527–28. This Court considered rent control to be a regulation of use that must be evaluated under *Penn Central*, not a physical taking of the willingly leased property. *Id.* at 528–30.

Since then, the court below and many other courts have misappropriated *Yee*'s discussion of "voluntary leasing" to foreclose physical takings claims. It is the basis for a categorical rule that once a property owner grants possession to a third-party occupant, even if that grant is only limited or conditional, the government is then free to authorize a greater or new physical occupation under the terms, conditions, and

duration of its choosing and with constitutional impunity. Put differently, when the owner cracks open the door for some, the government has license to open the door widely for most all. Under this interpretation of *Yee*, a rental property owner's fundamental right to possess and exclude is constitutionally lesser than that of other property owners. And the government always has a free hand.

In this case, Petitioners Gene Gonzales, Susan Gonzales, and Horwath Family Two, LLC, and members of Petitioner Washington Landlord Association all supply much-needed rental housing to tenants whose possession was conditional upon paying rent, maintaining the property in good condition, abiding by the lease, and leaving when the lease expires. This leasehold agreement between housing provider and tenant was consistent with longstanding property traditions. However, in March 2020, Washington commandeered all rental properties by way of an "eviction moratorium."[2] It was a response to the COVID-19 pandemic and the State's attempt to ensure that renters could shelter in place. Occupants were legally authorized to continue in hostile possession and exclude the property owner, regardless of whether they complied with an existing lease, or even had a lease, and irrespective of the State's law of unlawful detainer. Pet.App. 81a–84a.

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[2] A "moratorium" is "1. An authorized postponement, usu. a lengthy one, in the deadline for paying a debt or performing an obligation. 2. The period of this delay. 3. The suspension of a specific activity." Black's Law Dict. (11th ed. 2019). Effectively, the eviction moratorium banned evictions.

Courts analyzing lawsuits challenging this infringement upon the owner's right to exclude faced a fork in the road: should they analyze the eviction ban under the physical takings line running from *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979), through *Loretto* and culminating in *Cedar Point*,[3] or alternatively, does *Yee* preclude physical takings claims that arise within the rental context?

Most have chosen the view that once a property owner agrees to lease, the government has carte blanche to compel a physical occupation that is distinct from, more than, and longer than what the owner consented to, without paying just compensation. Adopting this position, the Supreme Court of Washington upheld Washington's eviction ban, finding that the regulation of an existing landlord-tenant relationship was not a physical taking. Pet.App. 15a–16a (citing *Yee*, 503 U.S. at 513).

The court's decision to relieve the State of Fifth Amendment liability is irreconcilable with the entirety of the Court's physical takings jurisprudence. *Cedar Point*, 594 U.S. 139; *Horne v. Dep't of Agric.*, 576 U.S. 350 (2015); *Loretto*, 458 U.S. at 435; *Kaiser Aetna*, 444 U.S. at 179–80. Indeed, in *Alabama Association of Realtors v. Department of Health and Human Services*, this Court instructed that "preventing [owners] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." 141 S.Ct. 2485, 2489 (2021). The

[3] *Cedar Point* was decided in June 2021, while the State's eviction ban was well underway.

Court did not resolve the constitutional implications of such intrusion in *Alabama Association of Realtors*; the question is squarely presented as a constitutional matter here.

The decision below also conflicts with the Eighth Circuit. In *Heights Apartments LLC v. Walz*, the court analyzed a similar COVID eviction ban and held that, with respect to the alleged physical taking, *Cedar Point* applied and *Yee* had no place. 30 F.4th 720, *denying rehearing and rehearing en banc*, 39 F.4th 479 (8th Cir. 2022).

Opening private property to the beneficial use of others is one of the foundations of our economic system and it cannot be conditioned upon the waiver of a property right that is sacrosanct under the Fifth Amendment. However, across a spectrum of circumstances and a variety of properties, *Yee* has become the pillager of physical takings claims. The Supreme Court of Washington's decision below is simply one of the most recent of the repeated distortions of *Yee* at the expense of private property rights. Rental housing, medical housing, and even software has been forced to submit to uncompensated government-authorized invasions, partitioning these owners into a subordinate class with less constitutional protection. Intervention by this Court is needed to clarify the scope and limitations of *Yee*, otherwise the dissolution of owners' fundamental property rights will continue unabated.

This Court should grant certiorari.

Statement of the Case

A. Washington Bans Evictions During COVID, Compelling Private Property Owners to Provide Almost Unconditional Public Housing

In response to the COVID-19 pandemic, on February 29, 2020, the State of Washington, through Governor Jay Inslee, issued a "State of Emergency" Order. Pet.App. 74a. The purpose was to address the threat of the spread of the Pandemic throughout Washington's communities. Pet.App. 74a–75a. On March 18, 2020, Governor Inslee issued Proclamation 20-19. Pet.App. 43a. In relevant part, it prohibited housing providers from evicting tenants that failed to pay rent and was to remain in effect until April 17, 2020. Pet.App. 43a. Subsequent Proclamations followed both expanding the restrictions placed upon housing providers and extending the duration of the eviction ban. Pet.App. 43a–45a. Culminating in Proclamation 20-19.6, property owners could not evict occupants for any reason with three exceptions: (1) if, as attested to in an affidavit by the owner and as described with particularity, it was necessary to respond to a significant and immediate risk to health, safety, or property caused by the occupant; (2) if the owner intended to personally occupy the unit as a primary residence; or (3) if the owner intended to sell the property, with the latter two exceptions also requiring 60 days' written notice. Pet.App. 82a–83a. Property owners found in violation were subject to

criminal penalties. Pet.App. 91a. Proclamation 20-19.6 was in place until June 30, 2021.[4] Pet.App. 80a.

Petitioners Gene Gonzales and Susan Gonzales own several residential rental properties in Centralia, Washington. Pet.App. 39a. After the enactment of Washington's eviction ban, at least one of their tenants defaulted on rent and utility payments. Pet.App. 39a. The tenant's rationale was "why should I pay them anything: they can't shut me off due to the Pandemic." Pet.App. 39a. The ban left the Gonzaleses unable to evict the tenant. Petitioner Horwath Family Two, LLC also owns a residential property located in Centralia, Washington. Pet.App. 39a. Subsequent to the Washington eviction ban, one of its tenants stopped paying rent and the required utility payments. Pet.App. 39a. The tenant also refused to respond to repeated efforts to work out payment options. Pet.App. 39a. Petitioner Washington Landlord Association is a nonprofit association representing the interests of landlords in Washington State. Clerks Papers 197. Amongst its members are housing providers who lease residential property and are prejudicially affected by the eviction ban. *Id.*

B. Proceedings Below

On December 1, 2020, Petitioners sued in Washington state court alleging, inter alia, that the State's eviction ban pursuant to Proclamation 20-19,

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[4] Not directly challenged here is the State's subsequent "Bridge the Gap" Proclamation, issued on June 29, 2021, and in effect until September 30, 2021.
https://governor.wa.gov/sites/default/files/proclamations/proc_21-09.pdf

et al., was a physical taking in violation of the Takings Clause of Article I, Section 16 of the Washington Constitution. Pet.App. 39a; Wash. Const. art. I, § 16 ("No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner[.]"). Petitioners sought declaratory relief. Pet.App. 39a–40a.

Petitioners subsequently filed a motion for partial summary judgment and Respondents cross-filed for summary judgment. Pet.App. 40a. By Order dated May 21, 2021, the Superior Court of Washington granted the Respondents' motion and dismissed Petitioners' action. Pet.App. 40a.

The trial court's determination was affirmed by the Court of Appeals of Washington on February 23, 2022. Pet.App. 34a–69a. As an initial matter, it held that Petitioners' declaratory judgment action was not moot. Pet.App. 45a–46a. Rather, it presented "issues of continuing and substantial public interest" with respect to an eviction moratorium that could be enacted again. Pet.App. 46a. Acknowledging that "Washington courts generally apply the federal takings analysis," Pet.App. 58a, the court then held that the state's eviction ban was not a physical taking because such argument "is inconsistent with the United States Supreme Court's analysis in *Yee*." Pet.App. 59a. The Petitioners' initial invitation to the tenants was dispositive and precluded a physical takings claim. Pet.App. 61a–62a.

The Supreme Court of Washington also affirmed the dismissal of Petitioners' action. Pet.App. 1a–33a. As with its lower court, it held that Petitioners' action

was not moot. Pet.App. 8a. More specifically, that it "is a matter of public concern. Undoubtedly, our state will face crises again that will call for the use of emergency power. It is appropriate for this court to consider whether that power was used lawfully here to guide its use in the future." Pet.App. 8a. With regard to the takings claim, it "assum[ed] without deciding" that federal law applied. Pet.App. 15a. The court distinguished *Cedar Point Nursery* and held, in alleged accord with *Yee*, that the initial invitation to the tenants meant that the State's eviction ban was merely the regulation of the landlord-tenant relationship and not a physical taking. Pet.App. 15a–16a.

Reasons for Granting the Petition

I. Certiorari Is Needed to Clarify That a Conditional, Limited Grant of Occupancy Does Not Categorically Bar All Future Physical Takings Claims

A. What *Yee* Does—And Does Not—Hold

Property ownership is grounded in certain inherent and well-established rights: the right to possess what you own and to exclude others from it, the right to use property for your benefit, and the right to dispose of it as you wish. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945). These property rights have always been afforded vigilant protection within American jurisprudence because "the protection of private property is indispensable to the promotion of individual freedom" and "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so

for them." *Cedar Point*, 594 U.S. at 147; *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544, 552 (1972) (property rights are "an essential pre-condition to the realization of other basic civil rights and liberties").

Government regulations that impact property rights are of a "[near] infinite variety." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012). To corral them, different legal standards have evolved to identify those regulations that have "gone too far" and are "functionally equivalent to the classic taking." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). With regard to a property owner's right to possess and exclude, a government-compelled physical occupation is a categorical taking that requires the payment of just compensation regardless of any other facts and circumstances. *Loretto*, 458 U.S. at 434. However, with regard to a property owner's right to use, there are two possible paths. When there is a complete taking of all economically beneficial use, the government's liability is, again, categorical. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992). For only a partial taking of the right to use, the regulation must be evaluated under the ad hoc test of *Penn Central*, with due consideration given to the regulation's economic impact, the owner's reasonable investment-backed expectations, and the regulation's character. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

With the above in mind, the central issue in *Yee* was which of these tests applied. The property owners challenged a local rent control ordinance that, in combination with a state law, limited how much rent the owners could charge for the land beneath their

tenants' mobile homes. 503 U.S. at 524–25. But they did not claim that it was a partial taking of the right to use under *Penn Central*. Instead, they alleged a facial physical taking of "a discrete interest in land—the right to occupy land indefinitely at a submarket rent." *Id.* at 527. At the same time, the property owners did not seek to evict anyone, nor object to the occupancy of any particular tenant. Had they wanted to, the owners were free to evict on numerous grounds. *Id.* at 524, 527–28. Consequently, this Court held that the physical taking doctrine was not the correct theory to challenge a rent control regulation. *Id.* at 527 ("This argument, while perhaps within the scope of our regulatory taking cases, cannot be squared easily with our cases on physical takings."). In other words, a potential taking of the right to use cannot be adjudged by the law applicable to the right to possess and exclude. As the rent control statute at issue "merely regulate[s] petitioners' use of their land," *id.* at 528, it must be evaluated under the ad hoc test of *Penn Central*. *Id.* at 529. Further, *Yee* confirmed that a physical taking would lie if the regulation "compel[led] a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Id.* at 528; *id.* at 531–32 ("Had the city required such an occupation, of course, petitioners would have a right to compensation, and the city might then lack the power to condition petitioners' ability to run mobile home parks on their waiver of this right.").[5]

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[5] *Cedar Point* confirmed that a "physical appropriation is a taking whether it is permanent or temporary." *Cedar Point*, 594 U.S. at 153.

B. The *Yee* Juggernaut Wipes Out Virtually All Physical Takings Claims When a Property Owner Initially Grants Limited, Conditional Consent for Entry

In the course of explaining why *Yee* was not a physical takings case, this Court twice referenced the owner's voluntary decision to rent. *Yee*, 503 U.S. at 527 ("[T]he Escondido rent control ordinance, even when considered in conjunction with the California Mobilehome Residency Law, authorizes no such [physical invasion]. Petitioners voluntarily rented their land to mobile homeowners."); *id.* at 531 (The owner's inability to choose its tenants via price discrimination was not a physical taking because "it does not convert regulation into the unwanted physical occupation of land. Because they voluntarily open their property to occupation by others, petitioners cannot assert a per se right to compensation based on their inability to exclude particular individuals.").

Ever since, lower courts routinely interpret these discussions of "voluntariness" to mean that anytime a property owner consents to a third-party's possession, regardless of whether it is only limited or conditional, physical takings claims are forever legally barred. Any third-party possession is dispositive and the property owner's objection to a continued occupation is legally irrelevant. *See, e.g.*, *Kagan v. City of Los Angeles*, No. 21-55233, 2022 WL 16849064 (9th Cir. Nov. 10, 2022) (property owner could not evict "protected" tenant even to move his own family members into the unit); *Harmon v. Markus*, 412

F.App'x 420, 422 (2d Cir. 2011) (purchasers of rent-controlled property "acquiesced in its continued use as rental housing"); *Troy Ltd. v. Renna*, 727 F.2d 287, 290–91, 301–02 (3d Cir. 1984) (sustaining a statute that prevented owners who converted a rental apartment building to a condominium from evicting senior citizens and disabled tenants for forty years unless, inter alia, the tenants' income level was above a certain threshold).

Consequently, the government can then forcibly alter and expand the occupancy to a near unlimited degree and without regard to just compensation; irrespective of an owner's consent or the occupant's desire or ability to preserve and pay for the property that it has been given. As one commentator described soon after *Yee* was issued:

> The dangerous doctrine, which receives a regrettable boost from the *Yee* decision, is that if the landowner voluntarily grants a limited estate, then the state can stretch that interest into a fee simple without paying just compensation. So often legislatures and courts look at the process from the wrong end of the telescope. The lease has already been granted, so what is wrong with helping out a tenant in need by expanding its duration? Wholly apart from any inequity to the landlord—an outcome that this Court regards as a philosophical contradiction in terms—the results of this outlook are insidious in the long run.

Richard A. Epstein, Yee v. City of Escondido*: The Supreme Court Strikes Out Again*, 26 Loy. L.A. L. Rev. 3, 17–18 (1992); *see also* William K. Jones,

Confiscation: A Rationale of the Law of Takings, 24 Hofstra L. Rev. 1, 82 (1995) (regarding *Yee*, "it is unclear why the initial 'invitation' should be controlling"; the government cannot extend the invitation in perpetuity without just compensation).

As predicted, two years after *Yee*, the New York Court of Appeal held that a compelled, indefinite rental tenancy was not an unconstitutional physical taking. *Rent Stabilization Association of New York City, Inc. v. Higgins*, 83 N.Y.2d 156, 172 (1993), challenged a part of New York's rent control law that forced rent stabilized property owners to "offer a renewal lease to a departed tenant's newly defined family member." This newfound authorization created a perpetual leasehold, whereby the tenancy could be passed down from relative-to-relative forever over the property owner's objection. As even the court noted, "a rent-regulated tenancy might itself be of indefinite duration." *Id.* Nonetheless, based upon *Yee*, the New York court held that this was not a physical taking. It was dispositive that "the owner [] voluntary acquiesce[d] in the use of its property for rental housing." *Id.* (citing *Yee*).

A few years later, a second New York statute mandated that once a hotel guest checked into a "class B" hotel and stayed for six months, that hotel room was transformed into a residential rental and the guest was deemed a rent-regulated and permanent tenant. The court found that "the forced conversion from renting to transients, on the one hand, and leasing to permanent tenants, on the other, is not a physical taking." *Greystone Hotel Co. v. City of New York*, 13 F.Supp.2d 524, 527 (S.D.N.Y. 1998). Relying

upon *Yee*, it held that the hotel "is not required to enter into a landlord-tenant relationship with a stranger: rather, it is required to expand its relationship with someone to whom it has already rented a room." *Id.*

The trend continued to the latest version of New York's rent control law which forces property owners to renew a tenant's lease regardless of the owner's consent. Lower courts again held, per *Yee*, that this is not a physical taking because the owner voluntarily agreed to rent in the first place. *74 Pinehurst LLC v. New York*, 59 F.4th 557, 563 (2d Cir. 2023); *335-7 LLC v. City of New York*, No. 21-823, 2023 WL 2291511, at *2 (2d Cir. Mar. 1, 2023); *Cmty. Hous. Improvement Program v. City of New York*, 59 F.4th 540, 551 (2d Cir. 2023).

Similarly, other jurisdictions have also utilized *Yee* to uphold local ordinances that granted lifetime occupancy. *Kagan*, 2022 WL 16849064, at *1 (citing to *Yee*, the court held that the compelled granting of a perpetual lease to a "protected" tenant was not a physical taking because the housing provider voluntarily rented the apartment and could evict for fault); *Cienega Gardens v. United States*, 265 F.3d 1237, 1248–49 (Fed. Cir. 2001) (pursuant to *Yee*, a federal ordinance that froze the property as mandatory low-income housing was not a physical taking because it "merely enhanced" an existing possessory interest); *State Agency of Development and Community Affairs v. Bisson*, 161 Vt. 8, 15 (1993) (rejecting the allegation that a mobile home statute that restricted evictions and effectively created a perpetual lease violated the Takings Clause).

Beyond permanent, or near permanent tenancies, *Yee* has arisen in other contexts. The D.C. Circuit Court of Appeals held that an owner's decision to use its property as rental housing meant that the forced affixing of satellite dishes to the real property was not a physical taking. *Bldg. Owners & Managers Ass'n Int'l v. F.C.C.*, 254 F.3d 89, 98 (D.C. Cir. 2001). Forsaking *Loretto* in favor of *Yee*, the court decided that once the owner ceded control to a tenant, the government could force a new physical occupation that the tenant wanted but the owner didn't. *Id.* at 97.

In the field of healthcare, the First and Second Circuits have held that once a medical facility voluntary accepts a patient, the government can then strip the facility of the right to exclude without liability for a physical taking. Obviously, there is an important public interest in guaranteeing access to health care. But under the Takings Clause, due consideration must also be given to those private property owners that are forced to bear the cost of providing public benefits. *See Connecticut Ass'n of Health Care Facilities, Inc. v. Bremby*, 519 F.App'x 44, 45 (2d Cir. 2013) (a local law prohibited nursing facilities from involuntarily discharging Medicaid patients was not a physical taking under *Yee*, because "the nursing homes here voluntarily accepted nursing home patients as customers"); *Franklin Mem'l Hosp. v. Harvey*, 575 F.3d 121, 126 (1st Cir. 2009) (a state statute that required local hospitals to provide free in-patient medical services to all low-income patients was not a physical taking because, as per *Yee*, if the hospital voluntarily chose to enter the business of

healthcare, then it would be subject to this compelled occupation).

Yee has also been dispositive with regard to a government-approved invasion into software. Certain Arizona car dealers were locked into a long-term contract with CDK Global and Reynolds & Reynolds (collectively "CDK"), providers of "Dealer Management Software." To the extent that the car dealers' data was held within this software program, it gave CDK a competitive advantage with respect to companion software programs. To wit, it could refuse to unlock the car dealers' data for competitors. Thus, to allow for greater competition, Arizona's Dealer Law authorized car dealers and software competitors to invade these software programs. CDK filed suit, claiming that the statute was a physical taking because it compels them to allow third parties "to enter, use, and occupy their [Dealer Management Software]." *CDK Glob. LLC v. Brnovich*, 16 F.4th 1266, 1281 (9th Cir. 2021). Relying upon *Yee*, the Ninth Circuit rejected the physical takings claim. The court said that "it is no answer that CDK may not wish to open its DMS to any particular authorized integrator. Once property owners voluntarily open their property to occupation by others, they cannot assert a *per se* right to compensation based on their inability to exclude particular individuals." *Id.* at 1282 (citing *Yee*, 503 U.S. at 530) (cleaned up).

The COVID eviction ban cases are the most recent of those to misinterpret the holding of *Yee*. With the exception of the Eighth Circuit's *Heights Apartments* decision, lower courts have held that the compelled occupation of rental units was not a physical taking

because the owner initially agreed to lease. Pet.App. 14a–16a; *see, e.g.*, *El Papel, LLC v. City of Seattle*, No. 22-35656, 2023 WL 7040314, at *2 (9th Cir. Oct. 26, 2023, *cert. denied* February 20, 2024 ("We agree with Seattle that the Supreme Court's decision in *Yee* controls here and forecloses the Landlords' per se physical-taking claim.") (cleaned up); *GHP Mgmt. Corp. v. City of Los Angeles*, No. CV-21-06311, 2022 WL 17069822, at *3 (C.D. Cal. Nov. 17, 2022) ("[A]s in *Yee*, the Moratorium does not swoop in out of the blue to force Plaintiffs to submit to a novel use of their property.… The tenants were invited by [the landlords], not forced upon them by the government.") (cleaned up); *Williams v. Alameda Cnty.*, 642 F.Supp.3d 1001, 1020 (N.D. Cal. 2022) ("Like the laws in *Yee*, the moratoria apply to tenants that the plaintiff landlords had already invited onto their property.… The *Yee* decision compels the conclusion that the moratoria, on their face, are not per se takings."); *Auracle Homes, LLC v. Lamont*, 478 F.Supp.3d 199, 220 (D. Conn. 2020) ("[N]o government has required any physical invasion of Plaintiffs' property.… As in *Yee*, Plaintiffs here voluntarily rented their land to residential tenants.") (cleaned up).[6]

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[6] For other lower court cases upholding COVID eviction moratoria, *see Gallo v. D.C.*, No. 1:21-CV-03298 (TNM), 2023 WL 7552703, at *7 (D.D.C. Nov. 14, 2023) ("He bought what he thought would be a profitable residential unit, and he ended up with a freeloader who avoided eviction because of the District's COVID-related eviction prohibition. But unfortunately for Gallo, binding caselaw simply does not provide a remedy against the city for landlords in his situation."); *Farhoud v. Brown*, No. 3:20-

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Property owners' fundamental right to possess and exclude has been radically altered by the enduring misinterpretation of *Yee*. For those that choose to rent their property, the cost of doing business is the loss of Fifth Amendment protection. And cast aside is the categorical rule that any government-authorized physical occupation, without the payment of just compensation, is an unconstitutional taking. When considering the deep intertwining of economic development and the unencumbered use of property, this misstep has particularly acute consequences. *See Hendler v. United States*, 952 F.2d 1364, 1375 (Fed. Cir. 1991) ("In addition to its central role in protecting the individual's right to be let alone, the importance of exclusive ownership—the ability to exclude freeriders—is now understood as essential to economic development, and to the avoidance of the wasting of resources found under common property systems."); Sharon Yamen et al., *In Defense of the Landlord: A New Understanding of the Property Owner*, 50 Urb. Law. 273, 275–76 (2021) (noting that almost half of all rental units are owned by "mom and pop" owners and that "[s]avvy tenants have

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CV-2226, 2022 WL 326092, at *10 (D. Or. Feb. 3, 2022); *Stuart Mills Props., LLC v. City of Burbank*, No. 22-CV-04246, 2022 WL 4493573, at *3 (C.D. Cal. Sept. 19, 2022); *Jevons v. Inslee*, 561 F.Supp.3d 1082, 1106 (E.D. Wash. 2021); *S. California Rental Hous. Ass'n v. Cnty. of San Diego*, 550 F.Supp.3d 853, 865 (S.D. Cal. 2021); *Baptiste v. Kennealy*, 490 F.Supp.3d 353, 388 (D. Mass. 2020)*; Elmsford Apt. Assocs., LLC v. Cuomo*, 469 F.Supp.3d 148, 163 (S.D.N.Y. 2020); *Rental Hous. Ass'n v. City of Seattle*, 22 Wash.App.2d 426, 448–49 (2022); *Matorin v. Massachusetts*, No. 2084CV01334, 2020 WL 12847146, at *10 (Mass. Super. Aug. 26, 2020).

capitalized on well-intended rent-control ordinances to fraudulently take or maintain possession of units at the expense of property owners, both large and small").

Further, it allows the occupancy of rental property to be dictated by the current government's public policy. Similar to how the desire for guaranteed housing led to the eviction prohibition here, with a showing of public purpose any politically favored lessee could be granted the occupancy rights of the government's choosing. Such lessees could include, for example, farmland, supermarkets, medical facilities, car manufacturers, distribution warehouses, energy companies, tech companies, and everything in between.

Thus, the narrow holding of *Yee* has been steadily expanded into something that is now unrecognizable from what this Court determined. No longer a case about the Fifth Amendment's standard of review for rent control, *Yee* has become the purveyor of categorical immunity from physical takings claims and the means by which rental property has been demoted from the ranks of those entitled to full constitutional protection.

II. Certiorari Should Be Granted to Resolve the Conflict Between the Supreme Court of Washington and the Decisions of This Court and Other Courts

A. The Supreme Court of Washington's Decision Conflicts with the Court's Physical Takings Precedent from *Kaiser Aetna* Through *Cedar Point*

Washington's eviction ban authorized occupants of rental property to remain in hostile possession and exclude the property owner. Pet.App. 81a–83a. This compelled occupation was near absolute and not conditioned upon a lease; or on the tenant paying rent, maintaining the property, refraining from criminal conduct, or declining to allow others to share in this unfettered possession. *Id*. While the commandeering of private property to guarantee public housing during a health pandemic may have reflected good intentions, the effect of the State's eviction ban was no different than the government physically invading and occupying the Petitioners' rental property itself. It erased the "expectancies embodied in the concept of property" derived from the well-established protections of unlawful detainer, and consequently "falls within this category of interests that the Government cannot take without compensation." *Kaiser Aetna*, 444 U.S. at 179–80.

Accordingly, under a straightforward reading of *Kaiser Aetna*, *Loretto*, and *Cedar Point*, this was a categorical physical taking. *See Fresh Pond Shopping Ctr., Inc. v. Callahan*, 464 U.S. 875, 877 (1983) (Rehnquist, J., dissenting from the denial of certiorari) (when the result of the ordinance is that the

property owner cannot possess the property "until the tenant decides to leave of his own volition" it is a categorical physical taking); *Heights*, 30 F.4th at 733; Paul J. Larkin, *The Sturm und Drang of the CDC's Home Eviction Moratorium*, 2021 Harv. J.L. & Pub. Pol'y Per Curiam 18, 28–29 ("The [CDC's] order forces an owner to accept a government-imposed squatter for as long as a moratorium is in effect. Unlike a rent control statute … the CDC's order entitles a tenant to reside in property that he or she no longer has a legitimate right to occupy without paying rent.") (footnote omitted). As one district court judge held during the emergency of World War II, when the government commandeered private property and sought only to pay rent:

> I know of no power in the government to force one to enter into a lease or contract relating to his property, but on the other hand, I think that the government has ample power to force the owner to surrender his property and that it may name what interest it desires to take and all the terms and conditions surrounding it. But when the government has done that it has taken the property and the owner has his remedy under his constitutional guarantee to receive just compensation to be fixed by a court and jury.

United States v. 9.94 Acres of Land in City of Charleston, 51 F.Supp. 478, 484 (E.D.S.C. 1943).

Physical takings are "perhaps the most serious form of invasion of an owner's property interests." *Loretto*, 458 U.S. at 435. It "chops through" the entire proverbial bundle of sticks, *id.*, and violates "one of the most treasured rights of property ownership." *Cedar*

Point, 594 U.S. at 149. Thus, "the right to exclude is [not] an empty formality, subject to modification at the government's pleasure. On the contrary, it is a fundamental element of the property right, that cannot be balanced away." *Id.* at 158; Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 (1998) ("Give someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property.").

Consequently, physical takings are "per se" or "categorical" takings. *Cedar Point*, 594 U.S. at 148–49; *Kaiser Aetna*, 444 U.S. at 179–80. Once this property right has been taken by the government, no other facts or circumstances need be considered. *Horne*, 576 U.S. at 360; *Loretto*, 458 U.S. at 434–35. This Court's precedent therefore treats almost any government-authorized occupation of property as a categorical physical taking absent the payment of just compensation. *Cedar Point*, 594 U.S. at 152 ("[G]overnment-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation."); *Hendler*, 952 F.2d at 1374–75 ("In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession—the right to *exclude* strangers, or for that matter friends, but especially the Government.").

The established physical takings precedent is reflected in the recent *Alabama Association of Realtors* decision. In determining that the CDC had exceeded its statutory authority in authorizing a

nationwide eviction ban, this Court also reviewed the equities of allowing the eviction ban to continue. It found that "preventing [owners] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." 141 S.Ct. at 2489 (citing *Loretto,* 458 U.S. at 435). Pointedly, the Court did not state that *Yee* applied, nor hold that the owner's initial consent to the tenant's possession barred a physical takings claim. *See also Pinewood Estates of Michigan v. Barnegat Twp. Leveling Bd.*, 898 F.2d 347, 355 (3d Cir. 1990) (Stapleton, J., concurring) ("[W]here the state permanently takes away a landlord's right to evict a tenant and his successors beyond the end of an agreed upon term a permanent physical occupation occurs and there is a *per se* taking under *Loretto*[.]").

The Supreme Court of Washington ignored all of this. Because Petitioners voluntarily chose to enter the residential rental business, the court categorically rejected the physical takings claim that followed. Pet.App. 14a–16a.

In so holding, the court was in direct conflict with *Loretto* and its progeny. Constitutional liability for a physical taking is determined only by the government action. *Cedar Point*, 594 U.S. at 148–49. The compelled occupation of a residential rental is no less a physical taking than the compelled occupation of any other real property. Thus, *Loretto* explicitly held that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation.… The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily

manipulated." 458 U.S. at 439 n.17. Nor has this Court ever countenanced the diminution of Fifth Amendment protection for owners that use their property in the commercial sphere. *Horne*, 576 U.S. at 366 ("selling produce in interstate commerce, although certainly subject to reasonable government regulation, is similarly not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection"); *see Valancourt Books, LLC v. Garland*, 82 F.4th 1222, 1231–32 (D.C. Cir. 2023) (the decision of an artist to enter the stream of commerce does not immunize the government from physical takings claims when it demands a free physical copy of all copyrighted works).

Looking at it from a different perspective, a tenant's occupancy is temporary and conditional, not permanent and absolute. *Garneau v. City of Seattle*, 147 F.3d 802, 814 (9th Cir. 1998) (O'Scannlain, J., concurring in part, dissenting in part) (noting that landlords retain the right to exclude and that "in its conventional sense, a 'tenant' is 'one who has the *temporary* use and occupation of real property' owned by someone else"); Black's Law Dict., *lease* (11th ed. 2019). The government cannot forcibly expand the occupancy that was consented to without the payment of just compensation because "the government does not have unlimited power to redefine property rights." *Loretto*, 458 U.S. at 439 (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)). Accordingly, when the government compels an occupation that is contrary to the property owner's consent, the lease, and the law of unlawful detainer,

this Court's precedent holds that it is a physical taking. *F.C.C. v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987) ("This element of required acquiescence is at the heart of the concept of occupation."); *see also Cable Arizona Corp. v. Coxcom, Inc.*, 261 F.3d 871, 876 (9th Cir. 2001) (were the statute to be read "as authorizing access over private easements [it] would gravely implicate the Takings Clause"); *Smiley First, LLC v. Dep't of Transp.*, 492 Mass. 103, 116 (2023) (because the government expanded the scope of the easement, it was an additional physical taking); *Bogart v. CapRock Commc'ns Corp.*, 69 P.3d 266, 271–72 (Okla. 2003) (a government regulation imposing "an increased servitude or burden" requires the payment of just compensation).

B. Certiorari Should Be Granted to Resolve the Circuit Split Between the Supreme Court of Washington, the Eighth Circuit's Decision in *Heights Apartments*, and Numerous State Court Decisions

The Eighth Circuit Court of Appeals addressed a physical takings claim resulting from a COVID eviction ban and held to the opposite of the court here. *Heights Apartments, LLC v. Walz*, 30 F.4th 720.

Like Washington, the State of Minnesota enacted an eviction ban prohibiting all residential evictions except for those cases where the tenants seriously endangered the safety of other residents or significantly damaged the property, or if the owner's family needed to move into the unit. *Id.* at 724–25. In affirming denial of the government's motion to dismiss, the Eighth Circuit held that the eviction ban

implicated the physical takings doctrine and *Yee* did not apply to physical takings claims:

> *Cedar Point Nursery* controls here and *Yee*, which the Walz Defendants rely on, is distinguishable. The rent controls in *Yee* limited the amount of rent that could be charged and neither deprived landlords of their right to evict nor compelled landlords to continue leasing the property past the leases' termination. The landlords in *Yee* sought to exclude future or incoming tenants rather than existing tenants. Here, the [Executive Orders] forbade the nonrenewal and termination of ongoing leases, even after they had been materially violated, unless the tenants seriously endangered the safety of others or damaged property significantly. According to Heights' complaint, the [Executive Orders] "turned every lease in Minnesota into an indefinite lease, terminable only at the option of the tenant." Heights has sufficiently alleged that the Walz Defendants deprived Heights of its right to exclude existing tenants without compensation. The well-pleaded allegations are sufficient to give rise to a plausible per se physical takings claim under *Cedar Point Nursery*.

Id. at 733 (cleaned up); *see also 301, 712, 2103 & 3151 LLC v. City of Minneapolis*, 27 F.4th 1377, 1383 (8th Cir. 2022) (in holding that a local ordinance restricting the categorical rejection of tenants with criminal histories and bad credit was not a physical taking, the Eighth Circuit noted that "an ordinance that would

require landlords to rent to individuals they would otherwise reject might be a physical-invasion taking"). This Court should grant this case to resolve the conflict. *See Heights Apartments, LLC v. Walz*, 39 F.4th 479, 482 (8th Cir. 2022) (Colloton, J., dissenting from denial of petition for rehearing en banc) ("Given the broad implications of the panel decision, and the conflicts in authority that the decision has generated, this proceeding involves questions of exceptional importance.… [T]he panel decision will live on as a circuit precedent at odds with decisions of the Supreme Court and other federal courts.").

The decision below also conflicts with state court decisions, magnifying the divide about whether *Yee* forces property owners to submit to a government-compelled occupation without the payment of just compensation. *See, e.g.*, *Polednak v. Rent Control Board of Cambridge*, 397 Mass. 854, 862 (1986) (a local ordinance prohibiting an owner from moving into her rented condominium was a physical taking); *Aspen-Tarpon Springs Ltd. P'ship v. Stuart*, 635 So.2d 61, 67–68 (Fla. Dist. Ct. App. 1994) (a statute that forced owners to either pay a substantial sum or acquiesce to a tenant's lifetime lease was a physical taking).

Of particular note is *Cwynar v. City & Cnty. of San Francisco*, 90 Cal.App.4th 637, 647–49 (2001), which conflicts with the Circuit where it is located. In that case, a city ordinance prohibited property owners from evicting tenants so that they could house themselves or their family members. The California Court of Appeal distinguished *Yee* as "a facial challenge to a purely economic rent control law," *id.* at 656–57, and

explained that *Yee* did not overrule the precedent that an eviction control regulation may be a physical taking. *Id.* at 657 (citing *Yee*, 503 U.S. at 528). Moreover, "the fact that the property was voluntarily rented at some time in the past does not preclude the plaintiffs from pleading and proving government coercion" created an unwanted tenant occupancy. *Id.* at 658. Thus, Californians with physical takings claims based on the right to exclude have markedly different chances of vindicating their constitutional rights depending on whether they seek relief in state or federal court.

The Supreme Court of Washington's decision is not reconcilable with this Court's clearly established precedent, the Eighth Circuit's *Heights Apartments*, or the foregoing state court decisions. Certiorari should be granted to resolve this significant conflict.

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Uncompensated physical takings are categorically unconstitutional regardless of the underlying facts and circumstances. Yet, the pervasive misreading of *Yee* by the court below and other courts has steadily broadened the scope of government action that is exempt from Fifth Amendment scrutiny. *Yee* was never intended to create a license for the government to compel the occupation of rental property without constraint, nor deny these property owners the protections of the Fifth Amendment. Without intervention by this Court, lower courts will continue the dismantling of property owners' fundamental right to possess and exclude and push the boundaries of what the government may compel without the payment of just compensation. Certiorari should be

granted to uphold the constitutional protection of private property rights set forth in *Loretto* and *Cedar Point* and confirm that *Yee* does not defeat a physical takings claim in the face of a government-mandated occupation by an unwanted third party.

Conclusion

This Court should grant the petition.

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Respectfully submitted,

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